

**ELECTION**

Applicant elects, with traverse, what the Examiner has characterized as the species deemed drawn to constructing a welding apparatus, and corresponding to claims 1-21.

**REMARKS**

The Examiner has identified two ‘species’ in the pending claims. The Examiner’s classification of the ‘species’ includes a first species consisting of claims 1-21 pertaining to constructing a welding apparatus and a second species consisting of claims 22-23 pertaining to filling a gas.

The Examiner has failed to satisfy the burden required for a species restriction. As stated in MPEP § 806.04(b), species can be either independent or distinct. For independent species, the Examiner must show that “species under a claimed genus are not connected in any of design, operation, or effect.” *MPEP § 806.04(b)*. The Examiner has failed to show that the species are not connected in any of design, operation, or effect. The Examiner merely concluded that the species are “independent or distinct” and that one species pertains to a welding apparatus and the other pertains to filling a gas. *See Office Action, Mar. 28, 2006 p. 2*. This alone does not show that the Examiner’s identified species are independent. Thus, the Examiner has not met the burden under MPEP § 806.04(b) to show independent species.

Alternatively, for the Examiner to show that inventions are related as disclosed and distinct as claimed, “the question of restriction must be determined by both the practice applicable to election of species and the practice applicable to other types of restrictions such as those covered in MPEP § 806.05 – § 806.05(j).” *MPEP § 806.04(b)*. The Examiner made no attempt to show that the species are distinct under any of MPEP § 806.05 – § 806.05(j). Additionally, the Examiner “must explain why there would be a serious burden on the examiner if restriction is not required.” *MPEP § 808.02*. The Examiner may show a serious burden by separate classification, separate status in the art, or a different field of search. *See Id.* The Examiner failed to show any separate classification, any separate status in the art, or any different field of search. Instead, the Examiner merely concluded that the species may be distinct because one species “pertains to a welding apparatus” and the other “pertains to filling a gas.” *See Office Action, supra at 2*. Thus, the Examiner failed to meet the requirements as set forth by MPEP § 806.04(b) and MPEP § 808.02.

The Examiner has failed to address any of the elements required to satisfy the burden required in making any restriction requirement, let alone a species restriction. As such, the restriction requirement in the Office Action mailed March 28, 2006 is grossly inadequate and not sustainable. It is also noted that a restriction requirement must be based on claim elements, not simply preamble language.

For all these reasons, Applicant respectfully requests rejoinder of all claims. The Examiner is invited to call the undersigned to discuss this Election or any other matters regarding this application to further prosecution.

Respectfully submitted,

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<sup>1</sup> The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 50-2623. Should no proper payment be enclosed herewith, as by credit card authorization being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 50-2623. If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicant hereby petitions for such extensions under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 50-2623. Please consider this a general authorization to charge any fee that is due in this case, if not otherwise timely paid, to Deposit Account No. 50-2623.